

7 Official Opinions of the Compliance Board 1 (2010)

Exceptions Permitting Closed Sessions – Procurement – Closed sessions during which vendors made oral presentations as part of competitive procurement process allowed

January 21, 2010

Joseph H. Potter

The Open Meetings Compliance Board has considered your complaint that the Council of the Town of Ocean City violated the Open Meetings Act during the course of closed meetings conducted on September 29 and October 20, 2009. For the reasons explained below, we find that no violation occurred.

I

Complaint and Response

According to the complaint, on September 29, 2009, the Ocean City Council closed a meeting to discuss the acquisition of property and to consult with staff and others regarding pending or potential litigation. However, during a public meeting following that session, Councilwoman Mary Knight made “reference to the closed session saying that Council Members were provided information for reviewing as many as 10 contract proposals received for advertising Ocean City Maryland.” The complaint indicated that Councilwoman Knight stated that, beginning October 20, 2009, the Council and others connected with Ocean City tourism would meet in closed session to discuss the proposals.

The complaint alleged that the Council violated the Open Meetings Act on September 29, apparently premised on the belief that discussion exceeded the topic announced in closing the session, and on October 20 because, in the complainant’s view, “the Act does not permit secret discussions by a public body of ‘open bids’ submitted by vendors.”

In a timely response on behalf of the Council, City Solicitor Guy Ayres described the manner by which Ocean City selects an advertising agency to promote the municipality as a resort travel destination. The Town employs a competitive process whereby the Town puts out a request for proposals. The process includes two parts – a written response to a questionnaire and an oral interview and presentation. The Director of Tourism assembled packages of the responses received for the Mayor, Council Members, and City Manager. When the Council assembled for its closed session on September 29, 2009, the assembled packages were in the conference room for the Council Members to review at their leisure. According to the response, “[t]he written responses were neither discussed nor even mentioned in the closed session. The only topics discussed in the closed session of September 29 were the potential acquisition of two properties and consultation with [the City Solicitor] relative to a settlement of a personal injury claim against the town.” The response included the text of the exchange that occurred in the subsequent public session relating to the complainant’s allegation concerning the September 29 session.

According to the response, the October 20 session was closed pursuant to §10-508(a)(14)¹ and involved the oral presentations by competing advertising agencies. The reason for closure was to “avoid competing agencies from learning of the price structure of the others, to allow for negotiations, if the council desired, and to avoid competing agencies from reviewing the other presentations, which would give an unfair advantage, thereby adversely impacting the proposal process.” At a meeting on October 27, 2009, the Council discussed and voted to award the advertising contract in open session.

II

Analysis

September 29 Session

Based on the Council’s response, there was no evidence that the Council’s discussion during the closed session on September 29, 2009, extended beyond the topics identified as the Council’s justification for the closed session. The documents related to the advertising procurement were simply in the room available for pickup at the time the Council met in closed session. However, in order to allow us to better evaluate what occurred during the closed meeting,

¹All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

we asked the City Solicitor to provide us with a copy of the minutes of the closed meeting. That document was provided with the understanding that it would be kept confidential.² The minutes are consistent with the Council's response that the advertising procurement was not discussed. Thus, we find that no violation occurred.

October 20, 2009

Subject to certain procedural requirements, the Open Meeting Act allows a public body to close a meeting in order to conduct a competitive procurement process. The Act provides:

... a public body may meet in closed session or adjourn an open session to a closed session only to:

...
(14) before a contract is awarded or bids are opened, discuss a matter directly related to a negotiating strategy or the contents of a bid or proposal, if public discussion or disclosure would adversely impact the ability of the public body to participate in the competitive bidding or proposal process.

§10-508(a)(14). Had competing advertising agencies had been able to sit through the presentations of their competitors who met with the Council and other members of the evaluation team, the competitive process would have been compromised. In our view, the purpose of the October 20 closed session clearly fit within the permissible scope of §10-508(a)(14). As a result, we find that no violation occurred.

²SG §10-502.5(c)(2)(ii) provides that “[t]he [Compliance] Board shall maintain the confidentiality of minutes and any tape recording submitted by a public body that are sealed in accordance with §10-509(c)(3)(ii) of this subtitle.”

III

Conclusion

In summary, we find that the Council of the Town of Ocean City did not violate the Open Meetings Act on September 29 or October 20, 2009 by improperly considering matters in closed sessions that were required to be discussed in public view. The topics of discussions during the closed sessions were permissible under provisions of the Act.

OPEN MEETINGS COMPLIANCE BOARD

Elizabeth L. Nilson, Esquire

Courtney J. McKeldin

Julio Morales, Esquire